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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 57-1995
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INQUIRY RE: A request by the Dunbar Residents Association for environmental test results on a Vancouver site submitted to the Ministry of Environment, Lands and Parks by Chevron Canada Limited

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on July 5, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review submitted by the Environmental Affairs Committee of the Dunbar Residents Association (the applicant) to the Ministry of Environment, Lands and Parks (the Ministry) for test results from a former service station site in Vancouver owned by Chevron Canada Limited (the third party). The third party submitted the test results to the Ministry in order to establish a base level of on-site contaminants to be compared with later test results following a site remedial (decontamination) process.

The applicant requested the test results by way of a letter to the Ministry dated January 24, 1995. It consulted with the third party and replied on March 14, 1995. The Ministry denied access to the test results on the basis that disclosure would be harmful to the business interests of the third party, contrary to section 21 of the Act. On April 4, 1995 the applicant submitted a request for review to the Office of the Information and Privacy Commissioner (the Office).

2. Documentation of the inquiry process

On June 21, 1995 the Office issued a Notice of Inquiry and a one-page Portfolio Officer's fact report, which was accepted by the parties as accurate for the purpose of conducting this inquiry.

The Office invited representations from the applicant, the public body, and the third party. The parties to this inquiry responded according to the timelines set out in the Notice of Inquiry.

3. Issue under review at the inquiry

The issue in this inquiry is the applicability of section 21 of the Act to the records in dispute. Section 21 of the Act reads as follows:

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal
(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information of a third party,
(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
(iii) result in undue financial loss or gain to any person or organization, or

....

Under section 57(3)(b) of the Act, at an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party, it is up to the third party to prove that the applicant has no right of access to the record. As discussed below, the Ministry changed its position during the process of mediation, which had the effect of shifting the burden of proof from the Ministry to the third party.

4. The records in dispute

The records in dispute in this inquiry are an environmental consulting report dated April 20, 1994 and a site remediation plan dated March 1994, both of which relate to the third party's former service station in Vancouver. Substantial portions of both documents have been withheld from the applicant.

5. The Dunbar Residents Association's case

The applicant wants access to the two reports prepared by O'Connor Associates Environmental Inc. on the ex-gas station site at Dunbar and 26th Avenue in Vancouver owned by Chevron. It argues that the severances of information on site exploration and contamination from these reports has offered it less detailed information than Chevron has already disclosed in public meetings:

We have been trying for some time to obtain information on the extent, and kind, of contamination at this site. We wish to make our own judgment on whether this site is "safe" and

whether the decontamination plan is acceptable to our neighbourhood community. We believe that it is in the public interest for Chevron to disclose the details on which they base their judgment that it is "safe." (Submission of the Applicant, p. 1)

Chevron has told the applicant that it is afraid that prospective buyers of the property might be affected by release of the contaminant surveys: "We believe that the contamination of this site has been public knowledge for some time and that disclosure of the details in the reports will not increase this public awareness." The applicant states that:

The site, which is adjacent to a busy bus stop, has been placarded by the Ministry of Environment to warn citizens of the potential discharge of contaminants during the decontamination process and there is now an extensive network of large white pipes installed on the site as part of the clean-up operation. (Submission of the Applicant, p. 2)

The community, the applicant argues, deserves equal footing with any prospective purchaser with respect to information about the site.

The applicant does not take a positive view of its treatment to date by Chevron:

From the correspondence released to us ... [y]ou can see that Chevron's replies to requests for information are general, vague, uninformative and paternalistic, essentially claiming that "there is nothing untoward happening here and we will make it better [trust me]." Our community does not find this acceptable ....

We know the site is contaminated and we know that the company responsible does not wish to disclose how badly it is or is not contaminated. .... The DRA [Dunbar Residents Association] Environmental Affairs Committee does not seek this information for the sake of forcing public disclosure or embarrassing Chevron. Our hope is that when we get the details, we will be able to assure our fellow citizens that it really is OK. (Submission of the Applicant, p. 2; see also Reply Submission of the Applicant, p. 3)

The applicant emphasizes that it has considerable scientific and technical expertise on its Environmental Committee to enable it to assess the information being sought, and that it will recruit expertise from the community, adjacent to the University of British Columbia, as needed. (See Reply Submission of the Applicant, p. 4)

The applicant submitted a detailed factual affidavit outlining what it has learned from Chevron about the contaminated site and what it still wishes to know based on access to the remaining records in dispute.

6. The Ministry of Environment, Lands and Parks's case

On May 30, 1995 the Ministry informed the third party that it would not support the third party's arguments under section 21(1) of the Act to withhold the information in dispute: "In particular, the head of the Ministry is unable to conclude that disclosure of the information could reasonably

be expected to cause one of the harms set out in s. 21(1)(c) of the Act." This was contrary to the Ministry's initial determination in the matter. (Submission of the Third Party, p. 10)

The Ministry asks me to uphold its decision to disclose the disputed information.

7. Chevron Canada Limited's case

The service station at the site operated from 1936 until 1994. The company prepared an assessment report and a remedial plan for the site and forwarded them to the Ministry. It is the company's intention to sell the site "following remediation of hydrocarbon contamination at the Site to levels which are suitable for residential redevelopment of the Site." (Submission of the Third Party, pp. 2, 6)

In the interests of brevity, I have presented relevant portions of the third party's arguments below.

8. Discussion

Section 21(1)(a)(ii): Scientific or technical information of a third party

I accept the view of the third party that the records in dispute qualify as "scientific and technical information" under this section of the Act.

In my judgment, the intent of the reference to "scientific" or "technical" information in this section is to protect internal secrets of a company. I note that the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.12, p. 12, defines "scientific information" as relating to "exhibiting the principles or methods of science." The examples used are a report on the methodology for testing drugs and a prototype aircraft. The Manual defines "technical information" as "information relating to a particular subject, craft or profession or its technique." The examples given are a system design specification and a plan for a solar heating installation. Ontario Order P-584 supports my interpretation of "technical information":

The information contained in the record is the result of a technical study of the subject properties undertaken by a firm of consulting engineers who are experts in the field of environmental testing and analysis. The record details a number of analytical tests undertaken at the subject lands and states the conclusions of its authors as to certain environmental issues.
I am satisfied that the first part of the section 17(1) test has been met as the disclosure of the record would reveal technical information.

In my view, section 21(1)(a)(ii) is intended to protect from disclosure as "technical" or "scientific" information data of the sort that a company collects from a service station site, such as in the present inquiry.

The third party is testing a service station site for possible contamination for the same environmental reasons that the applicant wishes to see the test results. I find that this is

"scientific or technical information" within the meaning of this subsection.

I would summarize my interpretation of the words "scientific" and "technical" in this section as follows for purposes of this inquiry. They do cover test data of the third party conducted in one of its own refineries to evaluate the efficiency of a process or actual conditions during a product run. The words "scientific" or "technical" include, in the context of this case, the results of environmental testing by a third party at a site away from its central place of doing business. Thus I find that the test results are "scientific" or "technical" information of the third party for the purposes of section 21(1)(a)(ii) of the Act.

Section 21(1)(b): Information supplied in confidence

In order to support its reliance on this section, the third party represents that the Ministry has treated such environmental assessment reports and remedial plans confidentially. (Submission of the Third Party, pp. 3-4) Chevron has also consistently treated the information in dispute in a confidential manner. (Submission of the Third Party, pp. 4-5)

On the evidence provided in this case, I find that the third party did submit the test results implicitly in confidence. I make the observation here, however, that the Ministry should review its practices of receipt of confidential information, particularly environmental information of the kind in this case, since disclosure is now governed by the terms of the Act.

Section 21(1)(c)(i): Harm competitive or negotiating position

The third party submits that:

The public disclosure of the Documents can reasonably be expected to harm significantly the competitive position or to interfere significantly with the negotiating position of Chevron ... and to result in similar information no longer being supplied to MELP [the Ministry] when it is in the public interest that similar information continue to be supplied .... (Submission of the Third Party, pp. 5-9)

I note that the Ministry now takes the position that the information does not meet the test in section 21(1)(c).

The third party argues that the records in dispute are now of historical significance, do not reflect current conditions on the site, and their disclosure could harm its negotiating position with respect to sale of the site and harm its competitive position in the retail gasoline marketplace. In my view, even if this potential harm were likely to occur, and Chevron be unable to sell the site "at the highest possible price," I do not find this harm to be "significant" (on the facts of this case) as that term is used in section 21(1)(c)(i). I note that the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.12, p. 16 makes a point that I have found to be relevant in the current inquiry: "What would significantly harm a small business, for example, might result in minimal damage to a much larger company." The Manual similarly states that "the ability of the third party to withstand harm" may be a factor in making a decision on this section.

The third party states that if the site is redeveloped for multiple family residential use, "the ultimate purchasers therefore are not sophisticated developers but rather individual members of the public seeking to purchase living space." In its view, release of negative information about the site through the applicant could thus hurt sales of units and lower the purchasing price for the site. (This particular categorization of a group of people, in my view, further strengthens the argument for disclosure in the public interest.) In my view, the general public has the right to interpretative information about the site from both the third party and the applicant. (See also the Reply Submission of the Applicant, pp. 2-3)

The third party is also concerned that its gasoline sales may suffer on the basis of negative publicity surrounding environmental issues. I find it highly unlikely that release of test results from one service station site will "harm significantly the competitive position" of Chevron Canada.

I find with respect to this section that disclosure of the records in dispute cannot reasonably be expected to harm significantly the competitive position, or interfere significantly with the negotiating position, of Chevron Canada, especially when the dispute is over one former service station site. I disagree with the notion that release of the disputed information will significantly reduce the value of the lot, if the remediation process is successful. Chevron thus fails on this part of the test.

Section 21(1)(c)(ii): Similar information no longer being supplied

The submission of the information in this case to the Ministry was in part voluntary and in part mandatory, reflecting the third party's mandated policy of maintaining an open and cooperative relationship with regulatory agencies. It is "quite possible" that "our policy will be changed such that information of this type will only be supplied to MELP [the Ministry] when strictly required by law." (Submission of the Third Party, pp. 8-9)

While I have no doubt about the Ministry's wishes to continue receiving such information in the public interest, it has alternative ways of obtaining the same information if it judges it important to do so. It will be up to the Ministry to fashion an appropriate way to acquire information from third parties that it requires for environmental assessments.

I find that disclosure of the test results could not reasonably be expected to result in such information no longer being supplied to the public body, when it is in the public interest that similar information continue to be supplied.

Section 57: The burden of proof

The Ministry originally supported the third party's position. It changed its decision during the ninety-day mediation process, thus switching the burden of proof to the third party. (Submission of the Third Party, p. 10) The latter protests that this happened and that it limited its preparation time. My main response is that the legislation imposes the same time limits on all of the parties and that mediation does often take unexpected turns. Furthermore, the applicant had warned the

third party at a private meeting on January 17, 1994 that it would pursue its rights under the Act. (Submission of the Third Party, appendix B, p. 3; Reply Submission of the Applicant, p. 4)

The Ministry informed the third party on June 22, 1995 that it "is not in the business of withholding information on the state of the environment from the community at large." (Submission of the Third Party, appendix H) Given the goals of the Act, I can only commend this sentiment. However, I would have reached the same conclusions in this inquiry, even if the Ministry and the third party were on the same side of this issue.

Accountability

In this connection, I agree with the following statement by the applicant:

We think that Chevron should treat us with the respect that is accorded laypersons who serve on juries. Tell us the truth, clearly and straight forwardly; allow us to listen to the experts, ask questions until we feel we have an understanding of the pros and cons, and trust us to make reasonable decisions. (Reply Submission of the Applicant, p. 4)

It is not enough for the third party to argue that three levels of government are already involved in the process and are "all acting on behalf of the community and the public, with the necessary scientific and technical expertise to understand the information presented in the engineering reports and to make conclusions as to efficacy of Chevron's plans." (Reply Submission of the Third Party, p. 2)
The public, especially in the form of a community group, has a right under the Act to learn what is going on at an environmental test site from the records in dispute. It is perfectly true, as the third party argues, that this disclosure will increase the prospects for "simplistic description" of "the potential for contaminant migration" and that "misunderstandings by members of the general public are likely." (Reply Submission of the Third Party, p. 2) But it is hard to argue that experts have done better than laypersons in the environmental arena without public input of the type that the Act now facilitates.

I find that the information requested by the applicant in this case does not fall within the exception provided in section 21(1) of the Act. Accordingly, the Ministry is required to give the applicant access to the records in dispute.

9. Order

Under section 58(2)(a) of the Act, I require the head of the Ministry of Environment, Lands and Parks to give access to the records in dispute to the applicant.

October 4, 1995

David H. Flaherty
Commissioner